No. 17-9572

In The Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

BRIEF OF *AMICI CURIAE* THE MAGNOLIA BAR ASSOCIATION, THE MISSISSIPPI CENTER FOR JUSTICE, AND INNOCENCE PROJECT NEW ORLEANS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

Amici curiae the Magnolia Bar Association, the Mississippi Center for Justice, and Innocence Project New Orleans respectfully submit this brief supporting the Petition for Writ of Certiorari filed by Curtis Flowers. [1]

INTEREST OF *AMICI CURIAE*

The Magnolia Bar Association, organized in 1955 to address the demand of Blacks for first class citizenship in Mississippi, has over one hundred members. The Magnolia Bar is dedicated to empowering Black Mississippians to participate in the judicial system as lawyers, judges, and, in particular in this case, criminal trial jurors.

The Mississippi Center for Justice (MCJ), a non-profit law firm committed to advancing racial and economic justice, advocates for low-income Mississippians and communities of color.

Innocence Project New Orleans (IPNO), a non-profit law firm and founding member of the Innocence Project Network, has freed and/or exonerated 32 innocent prisoners in Louisiana and

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[1] Pursuant to Rule 37.2(a), *amici* have received written consent to the filing of this brief from all parties. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or its counsel made a monetary contribution to its preparation or submission.

Mississippi. Five of the six Mississippi exonerees are Black. The National Registry of Exonerations reports fifteen out of eighteen Mississippi exonerees are Black.

Amici support full participation of citizens of color in criminal trial juries in Mississippi, and share an interest in preventing wrongful convictions of innocent men of color by juries from which citizens of color have been excluded. They therefore have an important perspective to offer the Court.

SUMMARY OF ARGUMENT

The Fourteenth Amendment's equal protection guarantee forbids racial discrimination barring minorities from jury service. Such discrimination not only violates the rights of prospective jurors and criminal defendants, but also "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[2]

The prosecution of Curtis Flowers demonstrates these evils. The state's case was built on faulty eyewitnesses, improper forensics, and false confessions from untruthful informants – known causes of wrongful convictions.[3] Flowers' prosecution further divided an area long torn by racial conflict,[4] and the racial composition of the six trial juries correlates with each jury's decision.[5]

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[2] *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).
[3] Section I.
[4] Section II.A.
[5] Section II.C.

The District Attorney's racially discriminatory jury selection in Flowers' sixth trial was consistent with his practice.[6] Its goal was to empanel the highest possible number of white jurors to secure a guilty verdict despite the scant evidence of guilt. The plan succeeded. The jury (eleven white, one Black) returned a guilty verdict after thirty minutes' deliberation.

In a racially diverse community, discrimination in jury selection threatens the jury's ability to subject the prosecution's case to critical scrutiny, raising the risk of wrongful convictions.[7] *Amici* request this Court grant certiorari to strengthen the institution of the jury as an essential protection of innocent defendants.

ARGUMENT

I. The Meager Case Against Flowers Should Have Invited Intense Scrutiny From the Jury.

Known causes of wrongful convictions include faulty eyewitnesses, improper forensics, false confessions, and untruthful informants.[8] This case is infected with all four infirmities. The state's questionable case should have required intense

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[6] Section II.B.

[7] Section III.

[8] "The Causes of Wrongful Convictions," The Innocence Project, https://www.innocenceproject.org/causes-wrongful-conviction./ (last viewed July 22, 2018) (reviewing the first 325 prisoners exonerated by DNA evidence in the United States).

scrutiny by the jury. The rapid verdict displayed no such caution.

A. The Evidence That Flowers Committed the Murders Was Questionable.

1. The eyewitness testimony was unreliable.

This Court recognizes "[t]he vagaries of eyewitness identification."[9] Because memory depends on an individual's perception, "memories are not exact recordings of events,"[10] but imperfect recollections. "As a rule, the longer the time period between acquisition, retention, and retrieval, the more difficulty [people] have retrieving the memory."[11]

Here, purported eyewitness accounts were given weeks, if not months, later. And further, the location and timing of the witnesses' alleged sightings are incompatible.[12] Many witnesses lacked independent memory of the exact day they saw Flowers.[13]

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[9] *U.S. v. Wade*, 388 U.S. 218, 228 (1967); *see also Manson v. Brathwaite*, 432 U.S. 98, 111-12 (1977); *Perry v. New Hampshire*, 565 U.S. 228, 244-45 (2012).

[10] Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, FED. CTS. L. REV., June 2006, at 7.

[11] *Id.* at 10.

[12] Tr. 3189-95, 2289-90, 2221-22, 2302, 2045-46, 2312; Ex. S-128 at 1319.

[13] For example, Edward McChristian now states, "I wasn't even really sure [what I had seen]. [Law enforcement] had more about it than I did." This included the actual date on which McChristian saw Flowers, which was supplied to him by the investigator. *In the Dark: The Route*, AMERICAN PUBLIC MEDIA

Moreover, the state's eyewitnesses gave five irreconcilable descriptions of Flowers' clothing. For example, one described "some shorts [that] . . . were white,"[14] while another offered "black jeans [and a] white shirt."[15] When Flowers was detained on the day of the murders, he wore blue knee-length pants and a blue shirt.[16] No clothes belonging to Flowers matched any witness' description.[17]

Porky Collins, questioned six weeks after the murders, identified Doyle Simpson from a photo lineup as the man he saw on the street outside Tardy Furniture that day. Only when prompted during a second photo spread did Collins identify Flowers.[18]

Finally, many witnesses were incentivized by promises of reward and threats of reprisal. Nobody came forward until a $30,000 reward was posted nine days after the murders.[19] This reward was explicitly referenced to potential witnesses as an incentive.[20]

(May 1, 2018), https://www.apmreports.org/story/2018/05/01/in-the-dark-s2e2) (last viewed July 16, 2018) [hereinafter *The Route*] at 28:00-31:30. *In the Dark* is a podcast by American Public Media, a group of nonprofit organizations that produces public radio programs. Organizational Structure, American Public Media, https://www.americanpublicmedia.org/about/org-structure/ (last viewed July 16, 2018).

[14] Tr. 1322.

[15] Tr. 2238.

[16] Tr. 2487.

[17] Tr. 2858-59.

[18] Tr. 3014-17; 72-73. Collins, who is white, originally had only reported the gender and complexion of the man he saw. Tr. 32.

[19] Ex. D-1, R.E. Tab 8; see also Tr. 1888. See also *The Route* at 15:15-15:45.

[20] In 1996, police took Latarsha Blissett from high school to the police station, where two investigators intimated she could

And several witnesses in the six trials reported being coerced by law enforcement.[21] This contradictory and incentivized testimony should have given the jury pause.

2. The state's forensic evidence was questionable and immaterial.

The investigation did not unearth DNA or fingerprints tying Flowers to the crime. No gun was found. The state's forensic evidence consisted of the results of a gunshot residue test, a bloody shoeprint found at the scene, and an attempt to match bullets found at the scene to a gun belonging to Flowers' cousin. This meager evidence demanded scrutiny.

A single particle of gunshot residue was detected on Flowers' hand. The state's technician acknowledged that the particle, by itself, did not bring the jury any closer to knowing whether its origin was firing a gun or another source of exposure.[22] Such

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receive the reward if she implicated Flowers. Blissett refused. *The Route* at 44:00-46:15. Blissett testified that Clemmie Flemming, a state eyewitness, admitted that she lied for the reward. *Flowers v. State*, 158 So.3d 1009, 1025 ¶ 14 (Miss. 2014).

[21] Nine months after the murders, Roy Harris was summoned by police and shown Flowers' picture. Harris denied seeing Flowers, but was intimidated into testifying otherwise. After the first trial, Harris recanted. *The Route* at 32:00-39:00. Another witness, Edward McChristian, also recounted being intimidated by investigators and supplied with details that he did not know otherwise. *The Route* at 28:00-31:30.

[22] Tr. 2630. Gunshot residue can transfer by contact with a contaminated person, a contaminated object, or from walking through a contaminated space. Lauren S. Blakey et al., *Fate and Behavior of Gunshot Residue – A Review*, J. OF FORENSIC SCI., Jan. 2018, at 9, 13.

other sources include the police car which carried Flowers to the station, or the station itself.[23] The particle's presence is also consistent with testimony that Flowers shot fireworks and worked on his car days before the crime.[24]

The state claimed a bloody shoeprint found at the scene was made by a Fila "Grant Hill" Size 10 ½ shoe belonging to Flowers. But the person who originally found the bodies did not see a shoeprint.[25] Neither did one of the first investigators on the scene.[26] It is therefore unknown whether the shoeprint was made during the crime or later that morning.

The store was unattended for almost an hour between the bodies' discovery and the arrival of law enforcement.[27] The store was open; anyone could have left a shoeprint or otherwise disturbed the scene.[28]

Moreover, scant evidence connected the shoeprint to Flowers. No shoes alleged to match the print were ever recovered. The state merely produced a shoebox from Flowers' girlfriend's home for the Fila brand shoe which allegedly made the shoeprint.[29] That box belonged to the girlfriend's son; Flowers's fingerprints were nowhere on it.[30]

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[23] Tr. 2630-32.
[24] *Flowers v. State*, 773 So.2d 309, 314 (Miss. 2000).
[25] Ex. S-127 22-24, 34.
[26] *Flowers VI*, 158 So.3d at 1025.
[27] Ex. S-127 at 8:6-7; Tr. 1834-35.
[28] See Tr. 2649.
[29] Tr. 2204-05.
[30] Tr. 2856, 2864, 2696.

The state never found a murder weapon. But they attempted to prove that a gun reported missing by Flowers' cousin (and alternate suspect) Doyle Simpson could be matched to bullets recovered from to the murder scene. A state's expert testified that bullets recovered from outside Simpson's house and Tardy Furniture were shot from a .380 semi-automatic and had characteristics of six lands with a right twist.[31] Although these are common characteristics,[32] the state used them to assert that the bullets were shot from Simpson's gun. On cross examination, the expert conceded that the bullets "could have come from a .380,"[33] and that "there are several thousands of those [.380 with six lands and a right twist] available."[34]

3. The jailhouse confessions are false.

In over twenty percent of known wrongful convictions, a "jailhouse snitch" testified that the defendant confessed.[35] Such testimony was the only direct evidence against Flowers.[36] Throughout the six trials, three separate jailhouse snitches testified; each has recanted.[37] Odell Hallmon, who testified in the

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[31] Tr. 2134-40.

[32] *See, e.g.*, https://www.bevfitchett.us/gunshot-wounds/the-forensic-aspects-of-ballistics-1.html (last reviewed July 24, 2018).

[33] Tr. 2156.

[34] Tr. 2157.

[35] Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1378 (2014).

[36] *Flowers v. State*, 158 So.3d 1009, 1039-40 (Miss. 2014).

[37] Hawkins recanted his testimony by affidavit in 2015; Veal admitted on tape to lying. *In the Dark: The Confessions,*

sixth trial, received leniency regarding his own criminal activity in exchange.[38] Hallmon admits now that "[Curtis Flowers] ain't never told me that [he committed the murders]. That was a lie. I don't know nothing about this shit. It was all make believe, everything was all make believe on my part."[39]

B. The Motive and Methods Ascribed to Flowers Are Implausible.

1. Motive

The prosecution argued that Flowers committed the murders in retaliation for losing his job. But Flowers worked at Tardy Furniture less than four days. After missing three days' work, Flowers was told his employment had ended, and that his paycheck would be docked to cover damaged

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AMERICAN PUBLIC MEDIA (May 15, 2018), at 20:00-21:25 https://www.apmreports.org/story/2018/05/15/in-the-dark-s2e4 (last viewed July 16, 2018). Veal described meeting with the Sheriff and the District Attorney to concoct his story. *Id.* at 7:00-15:55. After he agreed to cooperate, Veal was released from jail and his charges were dropped. *Id.* at 7:00-15:55.

[38] *In the Dark: Punishment*, AMERICAN PUBLIC MEDIA (May 29, 2018), at 8:00-13:35, https://www.apmreports.org/story/2018/05/29/in-the-dark-s2e6 (last reviewed July 16, 2018) [hereinafter *Punishment*]. *Id.* at 8:00-13:35; *In the Dark: Privilege*, AMERICAN PUBLIC MEDIA (May 22, 2018), at 11:45-12:30, 26:40-28:00, 38:13-40:40, https://www.apmreports.org/story/2018/05/22/in-the-dark-s2e5 (last reviewed July 16, 2018) [hereinafter *Privilege*]. One of the deputies who arrested Hallmon suspected some kind of deal, saying, "He worked out something with someone . . . 'cause he didn't stay in jail long." The deputy surmised that Hallmon's testimony against Flowers "helped him a lot out of some stuff." *Id.* at 16:00-17:20.

[39] *Punishment*, at 14:20-15:20.

merchandise.[40] No evidence showed that this decision upset Flowers.[41] Flowers did not experience financial hardship, receiving unemployment benefits both before and after his employment at Tardy.[42]

2. Knowledge of a Gun

The prosecution posited that Flowers set out in daylight to steal a gun from his cousin's car,[43] walked across town hours later to commit a quadruple homicide, and walked back home through town, still in daylight.[44]

No proof showed that Flowers knew where to find his cousin's gun. The cousin testified that he did not regularly keep a firearm in his car's glovebox,[45] and there "was no way that Curtis Flowers would have known the gun was in the car that particular morning."[46]

3. Manner of Killing

The murders were gravely efficient. Three victims were found within feet of each other;[47] two were shot once in the head each, and the other was shot twice.[48] The fourth victim was found some

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[40] Tr. 2496.

[41] Despite the lack of evidence, the prosecution asserted in closing argument that "investigators learned" Flowers "had a beef with the store." Tr. 3189.

[42] Tr. 2500.

[43] Flowers's cousin, Doyle Simpson, was a suspect in the murders. *See* Section I.C.1.

[44] Tr. 1818

[45] Tr. 2356.

[46] Tr. 2358.

[47] Tr. 2011-23.

[48] Tr. 2031.

distance away, with a single gunshot to the back of the head.[49] There were no signs of a struggle, any attempt to flee, or any effort to fight back, even after the shooting began.[50] None of the victims were bound.[51]

No proof explained how one person controlled the movements of four victims while shooting each in the head. No evidence showed how Flowers, with no criminal history, committed such a meticulous murder alone.

C. Evidence Pointing to Other Suspects Raises Reasonable Doubt of Flowers' Guilt.

1. Doyle Simpson

Doyle Simpson, Flowers's cousin, was cleared of suspicion on the day of the murders despite being a plausible suspect. Simpson owned the gun allegedly used in the murders. He conveniently reported it stolen on the day of the crime; because the gun was never found,[52] Simpson is the last known person in possession of the weapon.

Simpson's alibi was incomplete. Co-workers told investigators that Simpson was at work that day.[53] However, his job frequently required him to leave the work site,[54] providing opportunity to commit

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[49] Ex. S-39.
[50] Tr. 2011-31.
[51] Appellant's Br. at 20, *Flowers v. Mississippi*, No. 2010-DP-01348-SCT (Miss. Jul. 1, 2013).
[52] Tr. 2134-39.
[53] Tr. 2527.
[54] Tr. 2347.

the crime. Also, Simpson's sister twice saw his car, driving in opposite directions, between 9:30 a.m. and 10:00 a.m. that morning.[55] Another eyewitness noticed a car, closely matching Simpson's, in front of Tardy Furniture,[56] with a person resembling Simpson standing next to it.[57] As stated above, eyewitness Collins originally identified Simpson from the first photo spread he was shown.

2. Willie Hemphill

Hemphill was arrested during the investigation.[58] He had a criminal record, and was identified near Tardy Furniture the day of the crime.[59] He wore Fila brand shoes of the size and type that purportedly left the shoeprint.[60] He was held in jail eleven days. Nothing in the record indicates the reason for his release.[61]

3. Marcus Presley and LaSamuel Gamble

Presley and Gamble committed a string of robbery-homicides in Alabama in 1996 in a manner

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[55] Tr. 2794, 2791.
[56] Tr. 1960.
[57] Tr. 3031.
[58] *In the Dark: Discovery*, AMERICAN PUBLIC MEDIA (May 1, 2018), at 28:00-28:45, https://www.apmreports.org/story/2018/05/01/in-the-dark-s2e10 (last viewed July 16, 2018) [hereinafter *Discovery*].
[59] *Id.*
[60] *Id.*
[61] *See* Curtis Gilbert, *The Other Suspects: Who Law Enforcement Did and Didn't Investigate in the Tardy Furniture Murders*, AMERICAN PUBLIC MEDIA (June 26, 2018), https://www.apmreports.org/story/2018/06/26/other-suspects-tardy-furniture-murders (last viewed July 16, 2018).

similar to that in Winona. Presley's weapon was a .380, the same type of gun purportedly used in Winona, and he wore the same brand of shoes that allegedly left the shoeprint.[62]

II. Racial Division Isolates Black from White Citizens on the Tardy Furniture Murders.

A. Winona's History of Racial Conflict

Winona and its environs have a tortured history of racial conflict. Incidents of law enforcement beatings of Blacks suspected of agitating for racial justice occurred in August 1960,[63] November 1961,[64] and infamously, in June 1963, when Fannie Lou Hamer, Annelle Ponder, and other civil rights workers were arrested and beaten for sitting at the Winona bus station diner.[65] Intimidation sponsored by law enforcement continued in January 1965, when civil rights workers were threatened with eviction by

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[62] *See id.*

[63] Alan Bean, "Civil Rights tremors rumble through Montgomery County," Friends of Justice Blog, https://friendsofjustice.blog/2009/08/21/civil-rights-tremors-rumble-through-montgomery-county/ (last viewed July 18, 2018), *citing* Jackson Daily News accounts (victim refused to sit in the back of an interstate bus).

[64] Report of Tom Scarbrough, Miss. State Sovereignty Comm'n, "Winona – Montgomery County," at 4 (Feb. 23, 1962), http://www.mdah.ms.gov/arrec/digital_archives/sovcom/result.php?image=images/png/cd04/027513.png&otherstuff=2|65|0|83|1|1|1|27006 (last viewed July 18, 2018).

[65] *See Say It Plain Series*, "Fannie Lou Hamer, Testimony Before the Credentials Committee, Democratic National Convention," AMERICAN PUBLIC MEDIA, http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html, 3:05-8:11 (last viewed July 18, 2018).

the Sheriff, and endured nighttime shootings into their house[66] and stalking.[67]

In September 1966, a group of white men attacked Black children attempting to attend nearby Granada's white high school.[68] District Attorney Evans was a freshman at the school that September.[69] Another student, 15 year old Dianna Freelon-Foster, vividly recalls the attack:

> We walked out into the mob. And they beat us. And you know, just swinging the bats and whatever weapon it was they had in their hands. The one thing that I remember is them saying, constantly saying over and over again, "Nigger, go back to your school.

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[66] Incident Summary – Mississippi (January 1965), Student Nonviolent Coordinating Committee, from Lucile Montgomery Papers, 1963-1967; Freedom Summer Digital Collection at the University of Wisconsin, http://content.wisconsinhistory.org/cdm/ref/collection/p15932coll2/id/35295.

[67] MFDP Lauderdale County--WATS (Telephone) Reports, January 1965 (Mississippi Freedom Democratic Party. Lauderdale County (Miss.) records, 1964-1966, Freedom Summer Digital Collection at the University of Wisconsin, http://content.wisconsinhistory.org/cdm/ref/collection/p15932coll2/id/56477 (Last reviewed January 18, 2018).

[68] Letter of Bruce Hartford (1967), Civil Rights Movement Veterans Collection, Tougaloo College, at http://www.crmvet.org/docs/6700_grenada_ltr_excerpt.pdf.

[69] *In the Dark, The D.A.*, AMERICAN PUBLIC MEDIA, https://www.apmreports.org/story/2018/06/12/in-the-dark-s2e8 (last viewed July 24, 2018).

> We built a school for you. Why you coming over here with us?"[70]

Black student protests during that school year were met with armed resistance by law enforcement, including tear gas and arrests of children as young as 7 years old.[71]

The effect of Winona's continuing racial divide on elected officials is illustrated by an election commissioner who told a reporter, "You have to remember till about 1978, you couldn't get elected if you wanted to run for state representative unless you were approved by the White Citizens' Council."[72] That organization, founded in Carroll County (in the same Circuit Court District as Montgomery),[73] became defunct in the mid-1980s; but its successor, the Council of Conservative Citizens,[74] exercises

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[70] *Id.* The attackers were acquitted after 30 minutes' deliberation. Hartford, *supra.*

[71] *The D.A., supra.*

[72] Parker Yesko, "Letter from Winona: A year at the crossroads of Mississippi," AMERICAN PUBLIC MEDIA (May 1, 2018), https://www.apmreports.org/story/2018/05/01/winona-a-town-at-the-crossroads (last viewed July 18, 2018).

[73] Donna Ladd, "From Terrorists to Politicians, the Council of Concerned Citizens Has a Wide Reach," Jackson Free Press (June 22, 2015), http://www.jacksonfreepress.com/news/2015/jun/22/terrorists-politicians-council-conservative-citize/ (last viewed June 18, 2018).

[74] David Graham, "The White Supremacist Group That Inspired a Racist Manifesto," The Atlantic (June 22, 2015), https://www.theatlantic.com/politics/archive/2015/06/council-of-conservative-citizens-dylann-roof/396467/ (last viewed June 18, 2018); Southern Poverty Law Center, Council of Conservative Citizens, https://www.splcenter.org/fighting-hate/extremist-

considerable influence in the area. CCC's statement of principles includes:

> We also oppose all efforts to mix the races of mankind, to promote non-white races over the European-American people through so-called "affirmative action" and similar measures, to destroy or denigrate the European-American heritage, including the heritage of the Southern people, and to force the integration of the races.[75]

Winona's white elected officials have ties to the CCC. State Senator Lydia Chassaniol was the "surprise guest speaker" at CCC's 2009 national meeting. [76] She confirmed her CCC membership in two separate interviews.[77] CCC's publication reported

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files/group/council-conservative-citizens (last viewed June 18, 2018).

[75] Graham, *supra*.

[76] Ward Schaefer, "Minister Blasts Mississippi Senator's Connections," Jackson Free Press (July 10, 2009), http://www.jacksonfreepress.com/news/2009/jul/10/minister-blasts-mississippi-senators-connections/ (last viewed July 18, 2018).

[77] Extremist Files, Council of Conservative Citizens, Southern Poverty Law Center, https://www.splcenter.org/fighting-hate/extremist-files/group/council-conservative-citizens (last viewed July 18, 2018); Tom Mangold, "A Small Town in Mississippi," Crossing Continents, BBC Radio 4 (Nov. 26, 2009), https://www.bbc.co.uk/programmes/b00nyxvt (Flash player required) (last viewed July 18, 2018); transcript of broadcast printed by Alan Bean, "Mississippi Smoldering," Friends of Justice (Jan. 4, 2010),

that State Representative Bobby Howell frequently spoke to chapter meetings during his legislative service.[78] Karl Oliver, who replaced Howell in 2008, recently posted that the municipal officials who removed Confederate statutes in New Orleans "should be LYNCHED!"[79]

In his first election campaign, District Attorney Evans spoke at the Black Hawk Political Rally, sponsored by CCC.[80] He is known to have attended and spoken to other CCC meetings.[81]

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https://friendsofjustice.blog/2010/01/04/misaisippi-smoldering/ (last viewed July 18, 2018).

[78] Article, "Read a list of 26 U.S. elected officials whose ties with the white supremacist Council of Conservative Citizens (CCC) have been publicized in the CCC's Citizens Informer," Intelligence Report (Oct. 14, 2004), https://www.splcenter.org/fighting-hate/intelligence-report/2004/dozens-politicians-attend-council-conservative-citizens-events#16 (last viewed July 18, 2018).

[79] Arielle Dreher and Donna Ladd, "UPDATED: State Rep. Karl Oliver Calls for Lynching Over Statues, Later Apologizes," Jackson Free Press (May 21, 2017), http://www.jacksonfreepress.com/news/2017/may/21/report-mississippi-rep-karl-oliver-calls-lynching-/ (last viewed July 18, 2018).

[80] *The D.A.*, *supra*.

[81] Paul Alexander, "For Curtis Flowers, Mississippi is Still Burning," Rolling Stone (Aug. 7, 2013), https://www.rollingstone.com/politics/politics-news/for-curtis-flowers-mississippi-is-still-burning-188496/ (last viewed July 22, 2018) (CCC newsletter reports that Evans gave keynote address at 1991 annual meeting of Webster County CCC; and attended 1992 meeting at which Robert Patterson, founder of the original White Citizens Council, was the featured speaker).

B. The District Attorney Customarily Practices Race Discrimination in Jury Selection.

Statistical evidence demonstrates that District Attorney Evans and his office exercise peremptory challenges to strike Black prospective jurors to empanel the highest-possible percentage of white jurors.[82]

American Public Media Reports has published a study of jury selection in 225 trials prosecuted by Evans or his office from 1992 to 2017.[83] These prosecutors were almost four and a half times more likely to strike a Black juror than a white juror.[84] They used over seventy percent of their peremptory strikes against Black jurors, striking fifty percent of eligible Black jurors, compared to striking eleven percent of eligible white jurors.[85]

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[82] Will Craft, "Mississippi D.A. Has Long History of Striking Many Blacks From Juries," APM Reports (June 12, 2018), https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-juries/ (last reviewed July 18); see also Jerry Mitchell, "Report: Mississippi DA Struck Black Jurors at 4½ Times Greater Rate," Clarion-Ledger (June 12, 2018, 11:00 AM), https://www.clarionledger.com/story/news/2018/06/12/does-da-curtis-flowers-case-seek-strike-black-potential-jurors/692156002/ (last viewed July 18, 2018); Nemeth 'In the Dark' Examines Death Row Case of Curtis Flowers (National Public Radio broadcast June 19, 2018), https://www.npr.org/2018/06/19/621269610/in-the-dark-examines-death-row-case-of-curtis-flowers (last viewed July 18, 2018).

[83] Craft, supra.

[84] *Id.*

[85] *Id.*

For eighty-nine of those 225 trials, full voir dire transcripts were available.[86] Reporters generated an odds ratio, measuring how a potential juror's race impacted his or her chance of being struck by the prosecution. For the eighty-nine trials for which juror answers on voir dire is available, the analysis revealed that a Black juror's odds of being struck were six and a half times that of a white juror who provided similar answers to voir dire questions.

In short, "race was one of the most powerful factors predicting which jurors would be struck by the prosecution."[87] Seventy-eight percent of jurors who served in these trials from 1992 until 2017 were white, and only twenty-two percent were Black in a community that is approximately forty percent Black.[88]

C. Racial Tactics Were Used to Influence the *Flowers* Trials.

The *Flowers* prosecution further isolated the community racially.[89] Seating a diverse jury which might apply critical analysis to the evidence endangered the District Attorney's successful prosecution. Thus, consistent with his general practice, District Attorney Evans sought to maximize the number of white jurors in Flowers' trials, while his allies in the Mississippi Legislature sought

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[86] *Id.*

[87] *Id.* (offering the example that ninety-six percent of black jurors who had been accused of a crime were struck by the prosecution, compared to sixty percent of white jurors).

[88] *Id.*

[89] Tom Mangold, "A Small Town in Mississippi," *supra*; Bean, "Mississippi Smoldering," *supra*.

statutory amendments to broaden the venire to increase the proportion of white venire-members.

1. *Flowers I* through *Flowers V* – Racial Demographics of Jury Determines Outcome.

In *Flowers I* and *Flowers II* combined, ten peremptory challenges were exercised by Evans against Blacks. *Flowers I* was tried to an all-white jury.[90] In *Flowers II*, the trial judge granted a *Batson* objection to one of the State's peremptory challenges; that case was tried to a jury of 11 whites and one Black.[91]

The Mississippi Supreme Court condemned Evans' jury selection tactics in *Flowers III*:

> The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge . . . .
>
> ***
>
> At least 120 potential jurors indicated that they were of African–American descent, meaning that at least forty percent of the potential jury pool was African–American. This percentage closely tracks the racial demographics of Montgomery County, as defense counsel asserted that African–American citizens comprise forty-five

[90] Clerk's Papers (CP) at 1656.
[91] CP at 1662.

> percent of the county's population. **The prosecutor exercised all fifteen of his peremptory strikes on African-Americans, and the lone African-American who ultimately sat on Flowers' jury was seated after the State ran out of peremptory challenges.** Such a result cannot be considered "happenstance."[92]

The fourth trial, in November 2007, resulted in a mistrial; five Black jurors voted to acquit, seven white jurors to convict. In the fifth trial, September 2008, nine white and three Black jurors were chosen; again, the jury deadlocked on guilt/innocence. [93]

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[92] *Flowers v. State*, 947 So.2d 910, 935-36 ¶66 (Miss. 2007) (emphasis added).

[93] Emanuella Grinberg, "One crime, six trials and a 30-minute guilty verdict," CNN (June 18, 2010), http://www.cnn.com/2010/CRIME/06/18/mississippi.curtis.flowers/index.html (last viewed July 18, 2018).

The racial demography of the first five *Flowers* juries correlates with the result of their deliberations:

Trial	White Jurors	Black Jurors	Result
I	12	0	Guilty; Death
II	11	1	Guilty; Death
III	11	1	Guilty; Death
IV	7	5	Mistrial
V	9	3	Mistrial

2. Winona's Legislators Seek to Expand the Venire to Increase the Percentage of White Jurors.

This did not escape the notice of Winona's legislators. In the first legislative session after the deadlocked trials in *Flowers IV* and *Flowers V*, Rep. Howell proposed legislation to amend Mississippi's venue statute to permit the prosecution, as well as the defense, to seek a change of venue.[94] Sen. Chassaniol authored a bill to permit expansion of a criminal jury venire from the county where the crime occurred to all other counties in the district, if a prosecution resulted in a reversal after conviction, a mistrial, or an

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[94] http://billstatus.ls.state.ms.us/documents/2009/pdf/HB/0300-0399/HB0302IN.pdf.

inability to impanel an impartial jury.[95] Neither bill passed.

The percentages of white residents in the seven counties that comprise the Fifth Circuit Court District as of 2013 were as follows:[96]

Webster	78.9
Choctaw	68.0
Carroll	65.4
Attala	56.6
Grenada	56.3
Montgomery	53.4
Winston	52.1

Thus, had the legislation passed, the inclusion of five counties with higher percentages of white residents than Montgomery would have increased the percentage of white venire-members in Flowers' next trial. That was obviously the point.

3. *Flowers V*'s Black Holdout Juror Was Intimidated.

The September 2008 mistrial of *Flowers V* ended with Circuit Judge Joseph Loper[97] ordering the arrest of James Bibbs, an elderly Black man who was

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[95] http://billstatus.ls.state.ms.us/documents/2009/pdf/SB/2001-2099/SB2069PS.pdf

[96] https://www.indexmundi.com/facts/united-states/quick-facts/mississippi/white-population-percentage#map.

[97] Judge Loper was assigned to the case after the trial of *Flowers IV*.

reportedly the holdout juror. Bibbs told his fellow jurors that he was working in an alley of a lawnmower repair shop near Tardy Furniture on the day of the murders and had not seen the "manhole-to-manhole" search of downtown Winona to which law enforcement officers had testified.[98] Judge Loper accused Bibbs of perjury in *voir dire* when he did not indicate knowing about the case. However, because the "manhole-to-manhole" search was not alleged in the previous trials, Bibbs was not aware that he did, indeed, know a disputed fact in the case.[99]

Judge Loper's tirade and Bibbs's arrest were carried in the local media.[100] After the recusal of both Judge Loper and Evans, the charges against Bibbs were dismissed; but his treatment resonated throughout Montgomery County. After only one Black juror was seated in *Flowers VI*, Bibbs' lawyer noted the effect of his arrest, saying, "It was a completely bogus charge. I believe Bibbs was indicted to send a message to future jurors who vote for acquittal . . . . It's really unfortunate that there is only one African

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[98] *In The Dark: S2 E7: The Trials of Curtis Flowers, When the Jury Wasn't Nearly All White*, AMERICAN PUBLIC MEDIA, https://www.apmreports.org/story/2018/06/05/in-the-dark-s2e7 (last visited July 23, 2018).

[99] *Id.*

[100] See, e.g., Monica Land, "Mistrial in Flowers Case," Granada Star (Oct. 1, 2008), https://www.grenadastar.com/2008/10/01/mistrial-in-flowers-case/ (last viewed July 24, 2018); WAPT, "Judge Declares Another Mistrial for Flowers," http://www.msnewsnow.com/story/9109233/judge-declares-another-mistrial-for-flowers (last viewed July 24, 2018).

American on that jury in a crime where the town is so divided along racial lines."[101]

III. The Exclusion of Black Citizens From Flowers' Juries Diminishes Confidence in the Verdicts and Raises an Unacceptable Risk That an Innocent Man Has Been Convicted of Capital Murder.

Our Constitution ensures not only the right of the criminal defendant to trial by an impartial jury, selected from a representative cross section of the community.[102] It also guarantees the right of every citizen to equal protection of the laws, thereby barring discrimination in the composition of juries on the basis of race.[103] This Court has held that "with the

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[101] Lacey McLaughlin, "Majority White Jury in Flowers Trial," Jackson Free Press (June 11, 2010), http://www.jacksonfreepress.com/news/2010/jun/11/majority-white-jury-in-flowers-trial/ (last viewed July 18, 2018).

[102] U.S. CONST. amend. VI; *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.").

[103] Purposeful racial discrimination in jury selection "violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). But as this Court also recognizes, "discriminatory use of peremptory challenges harms the excluded jurors and the community at large," *Powers v. Ohio*, 499 U.S. 400, 406 (1991), and criminal defendants may raise the equal protection right of a third-party juror who has been intentionally excluded from service on the basis of race. *Powers*, 499 U.S. at 415. *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) ("We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free

exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[104] And "[w]hether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."[105] While these constitutional concerns center in the inherent rights of defendants and potential jurors, their promotion of diversity in jury composition may point to an equally important consideration – the performance of juries in deciding the matters that come before them.[106]

Justice Marshall once posited that diverse juries are in fact better decision makers than ones from which whole sections of the community have been stripped:

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from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.").

[104] *Powers v. Ohio*, 499 U.S. at 407.

[105] *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330 (1970).

[106] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 597, 599 (2006).

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[107]

Social science research on the influence of racial composition on group decision making has demonstrated such observable benefits from diversity. Not only do white and Black citizens participate in wider ranging discussions due to their different experiences and perspectives, as Justice Marshall suggested, but diversity has been shown to increase group creativity, information sharing, problem solving, flexibility, and thoughtfulness.[108]

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[107] *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

[108] Sommers at 598-99, *citing* Hoffman, L.R. & Maier, N.R.F., *Quality and acceptance of problem solutions by members of homogenous and heterogeneous groups*, 62 JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 401-407 (1961); Nemeth, C.J., *Dissent as driving cognition, attitudes, and judgements*, 13 SOCIAL COGNITION 273-291 (1995); Phillips, K.W., Mannix, E.A., Neale, M.A., & Gruenfeld, D.H., *Diverse groups and information sharing: The effects of congruent ties*, 40 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 495-510 (2004); and

For example, a 2006 study observed different decision-making processes when racially heterogeneous versus homogeneous mock juries were shown the trial of a Black defendant.[109] "Heterogeneous groups deliberated longer and considered a wider range of information than did homogenous groups."[110] In the heterogeneous juries, it was not just the Black participants who contributed to deliberation content by providing diverse points of views.[111] White participants were found to be just as responsible for the observed effects, as they "raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues when they were members of a diverse group."[112] The study also suggests that where white jurors expect to deliberate in a heterogeneous group, there is greater systemic processing of trial information and activation of white concern to avoid prejudice.[113]

Triandis, H.C., Hall, E.R., & Ewen, R.B., *Member heterogeneity and dydadic creativity*, 18 HUMAN RELATIONS 33-35 (1965).

[109] Sommers at 600.

[110] *Id.* at 606.

[111] As discussed in Section I, the *Flowers* juries were presented evidence of police incompetence and misconduct, including the unattended scene, as well as the promises and threats to witnesses. Inclusion of Black citizens on the juries would have altered the assessment of this evidence, given that Blacks provide a perspective on law enforcement often not experienced by white jurors. Similarly, the difficulties of cross-racial identification by white witnesses like Collins would have been more likely noted by Black jurors.

[112] *Id.*

[113] *Id.* Even the principal negative result noted from diversity in group decision making – interpersonal conflict – "may be useful when a group's primary goal is not boosting morale but rather good and thorough decision making." *Id.* at 598.

In addition to providing better decision-making, at the heart of the fair cross-section requirement is also the recognition that "[c]ommunity participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."[114] When sections of our community are intentionally excluded from jury service, public affirmation of the legitimacy of the deliberative jury process is seriously jeopardized.

CONCLUSION

The racially discriminatory selection practice employed by District Attorney Evans violated the rights of Curtis Flowers and of the Black venire-members excluded from the jury. But the accuracy and integrity of the jury's decision-making were also casualties of Evans' discrimination. Certiorari should be granted to review these issues.

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[114] *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).